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May 26, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions in the Telecommunciations Act of 1996; CC Docket No. 96-98

Dear Ms. Salas:

Enclosed for filing in the above-captioned matter is an original and 12 copies of MCI WORLDCOM, Inc.'s Comments in the above captioned-matter. Also enclosed is an extra copy to be file-stamped and returned.

Pursuant to the Commission's request, MCI WORLDCOM, Inc. is also submitting a copy of its Comments electronically via the Internet.

Thank you for your assistance.

Sincerely,

Donald B Verrilli (by [illegible])

Donald B. Verrilli, Jr.

Enclosure

No. of Copies rec'd 0+12
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF MCI WORLDCOM, INC.

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May 26, 1999

EXECUTIVE SUMMARY

This proceeding arises from the Supreme Court's remand to the Commission of a very narrow task: the Commission must refine its standards for new entrant access to Incumbent Local Exchange Carriers' (ILECs) network elements by reinterpreting the terms "necessary" and "impair" in § 251(d)(2) of the Telecommunications Act, thereby establishing a "limiting standard, rationally related to the goals of the Act." AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721, 736 (1999). A Competitive Local Exchange Carrier (CLEC) is entitled to access to an ILEC's network element if, without the element, the CLEC would be impaired in its ability to provide the services it seeks to provide, or, where an element is proprietary in nature, the element is necessary to the CLEC's provision of service. See § 251(d)(2). The implementing standard for this statutory provision must take into account sources for the network element other than the ILEC network. Iowa Utilities Board, 119 S. Ct. at 734.

A CLEC is impaired for purposes of § 251(d)(2)(B) if its ability to offer services is materially diminished, i.e., if an ILEC's denial of access to an element, taking into account the availability of the element outside the incumbent's network, either interferes with the ability of the CLEC promptly to provide services it seeks to offer to any class of customers in any geographic area, or provides a significant competitive advantage to the ILEC. CLEC access to a proprietary element is necessary for purposes of § 251(d)(2)(A) if, taking into account the availability or unavailability of the element outside the incumbent's network, the inability to get the element from the ILEC would seriously impair or obstruct the CLEC's ability to compete against the ILEC for any group of customers in any geographic area by giving the ILEC a competitive advantage that the CLEC cannot otherwise overcome on a timely basis.

To comply with the letter of the Act and to further the procompetitive goals of Congress, the Commission should apply these standards on a nationwide basis, and should identify a minimum set of network elements that must be unbundled nationally. The Act plainly contemplates national rules: the Commission is to determine which elements should be unbundled and may not forbear from enforcing CLECs' right to access to elements until it determines that the unbundling requirements of the Act have been fully implemented. See § 251(d)(2) and § 10(d). Moreover, only national rules can provide the requisite level of uniformity and predictability in the marketplace for CLECs to formulate and execute national business plans to offer local service. The record here will show that, with negligible exceptions nationwide, there is no wholesale market for network elements, that CLEC self-provisioning is currently prohibitively costly and time-consuming, and that where either of these alternatives exist in theory, the lack of connectivity and interchangeability of elements renders their use impracticable. Under these circumstances, without national unbundling of a core group of elements, CLECs will be impaired, for purposes of § 251(d)(2), in their ability to offer service.

Section 251(d)(2) does not implicate the essential facilities doctrine of antitrust theory. In choosing the impairment standard, Congress deliberately chose not to require a showing that an element is essential. Indeed, Congress went far beyond the confines of the essential facilities doctrine (which is merely a standard of proof for determining willful maintenance of monopoly power in violation of the Sherman Act) and established affirmative, procompetitive obligations on ILECs designed to open markets to competition, irrespective of whether the ILECs are or were violating the antitrust laws. Application of the essential facilities doctrine in the context of unbundling ILEC networks would substantially impede competition and thwart Congress's efforts to bring competition to local markets in a far more speedy fashion than the antitrust laws alone brought competition to long distance markets.

The ILECs have consistently argued that they should not be required to lease elements of their network to their competitors except on a showing of dire need. Their central complaint is that leasing creates powerful disincentives for competitors to build facilities and for ILECs to invest in innovative technology. To the contrary, by giving competitors the right to lease whenever they are impaired without it, the Commission will promote facilities-based competition. That competition will spur innovation, as it has in all free and open markets. The record of this proceeding and of the last three years explains why leasing alone holds out the prospect for competitive local telephone markets for all telephone customers -- business and residential, urban and rural.

The nation's telephone systems represent billions of dollars of wires and switches built over a century and controlled by the incumbent local exchange carriers. The most formidable barrier to competition is the tremendous economies of scale and connectivity that benefit the monopoly owners of this network. Unless these economies can be shared, it will be impossible for new entrants to compete profitably, except in a few small and highly profitable markets in which competitors can service a great many customers with relatively few facilities -- high volume business customers concentrated in urban areas.

The portion of the network that exhibits the greatest economies of scale, and that is most essential for any new entrant, is the local loop. The fundamental challenge facing the Commission in this proceeding is to ensure that CLECs have reasonable, nondiscriminatory unbundled access to local loops and related network elements so that CLECs can compete effectively with the ILECs to provide a full range of local services to all types of consumers. Under any reasonable test of impairment in § 251(d)(2)(B), the ability of CLECs to provide the services the seek to offer in competition with ILECs would be impaired if CLECs cannot obtain access to the loop.

Only if and when CLECs are able to connect their networks with unbundled ILEC loops will consumers enjoy the benefits of competition.

As important as whether CLECs get access to loops is how they get access. ILEC networks were not designed to provide CLECs with efficient and nondiscriminatory access directly to unbundled local loops, and economies of scale and connectivity preclude CLECs from providing ubiquitous competition through direct access to the loop. CLECs therefore need to use other, related ILEC network elements in combination with unbundled loops in order to provide competitive local services. Denying CLECs the ability to obtain access to unbundled loops through other network elements is the functional equivalent of denying access to the loop itself.

Just as no CLEC can duplicate the tens of millions of loops deployed by ILECs, no CLEC can connect its network directly to each of these loops, especially if it wants to provide (as MCI WorldCom does) voice and advanced services to urban, suburban, and rural residential consumers. No ILEC is close to fully implementing the Commission's recent order requiring them to provide collocation on more reasonable and nondiscriminatory terms. In addition, collocation is not technically feasible at some central offices, and in any event, CLECs will be able in the near term to collocate in only a small fraction of the thousands of ILEC central offices. Equally important, new technologies such as Digital Subscriber Loop (DSL) and Integrated Digital Loop Carrier (IDLC) systems installed by ILECs make it technically infeasible for CLECs to connect directly at individual central offices to loops serving millions of local customers, or to connect there without suffering technical and economic penalties that ILECs do not incur when they provide services over the same loops. Moreover, switching and transport also exhibit economies of scale. If there is to be ubiquitous competition for the mass markets customers, these elements must be available for lease.

Each of the other elements of the incumbents' networks identified in the Local Competition Order -- signaling systems, operations support systems, operator services and directory assistance platforms and directory assistance databases are essential to allow competitors to interconnect with the ILEC networks, or to provide essential functions and features that can only be obtained from the ILECs.

Without the ability to lease unbundled network elements in combination, MCI WorldCom can only reach those few customers whom it can profitably reach by building its own facilities. In those locations in which it is able to lease elements in combination, however, the company's business plan and strategy is to lease UNEs where it cannot yet self-provision efficiently, and to use these elements as part of a transition to more and more self-provisioning. Using leased facilities, MCI WorldCom intends to build a sufficient local customer base to create the economies of scale and scope that would justify provisioning its own network elements. Only by being allowed to lease facilities in this manner will MCI WorldCom generate sufficient revenues and customers to warrant the construction of new facilities. In the real world, leasing is not a deterrent to facilities construction; it is a necessary precondition to such construction.

For these reasons, the ability of CLECs to compete depends on reasonable, nondiscriminatory, cost-based unbundled access both to local loops and to the associated elements that CLECs need to use in combination with ILEC loops and their own networks. Only in this way can the Commission achieve the goal of the Telecommunications Act of 1996 to facilitate, through access to unbundled network elements, the immediate development of ubiquitous local competition in basic and advanced services to the entire array of residential and business customers.

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COMMENTS OF MCI WORLDCOM, INC.

I. INTRODUCTION

MCI WorldCom, Inc. ("MCI WorldCom"), pursuant to the Second Further Notice of Proposed Rulemaking ("Second FNPRM") in the above-captioned dockets,[1] hereby submits its Comments.[2] In the Second FNPRM, the Commission seeks comment on how, in view of the Supreme Court's ruling in AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721 (1999), the Commission should implement the unbundling standards in §§ 251(d)(2) and 251(c)(3) of the Telecommunications Act of 1996.[3]

1/ Second Further Notice of Proposed Rulemaking, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, FCC 99-97 (rel. Apr. 16, 1999) ("Second FNPRM").

2/ To assist the Commission's review of these Comments, sections of this document are coded with the number that refers to the paragraph in the FNPRM to which MCI WorldCom responds.

3/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the 1996 Act" or "the Act").

In Iowa Utilities Board, the Supreme Court upheld all but one of the regulations contained in the Commission's Local Competition Order.[4] It vacated the Commission's Rule 319, 47 C.F.R. § 51.319 (1997), on the narrow ground that the Commission "did not adequately consider the 'necessary and impair' standards when it gave blanket access to" network elements in Rule 319. 119 S. Ct. at 735. Although the Court took issue with none of the many policy judgments that informed the Commission's rulemaking, it found that in defining "impair" and of "necessary" "failed to provide some limiting standard, rationally related to the goals of the Act." Id. at 734. It therefore remanded the matter to the Commission "to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act, and giving some substance to the 'necessary' and 'impair' requirements." Id. at 736.

In this proceeding to reconsider the nature of the Act's unbundling requirements, the Commission therefore should, as the Court directed, begin by considering "the objectives of the Act." Id. In enacting the 1996 Act, Congress decided to end the status quo monopoly provision of local telephone service, including the States' protection of the Incumbent Local Exchange Carriers' ("ILECs") legal monopolies. Congress did not simply remove those legal barriers to competition, leaving only the antitrust laws to determine whether and when competitive markets would develop. Instead, Congress adopted an aggressively pro-competitive policy and enacted specific market-opening measures in an effort to jump-start local competition. In particular, Congress required the Commission promptly to fashion rules implementing three critical substantive requirements: (1) allowing competitors to interconnect their networks with the monopolists' networks; (2) to re-sell the monopolists' services; (3) and to lease the component parts of their network whenever competitors would be "impaired" without the ability to lease

4/ First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996) ("Local Competition Order").

those elements (or whenever the leasing of proprietary elements was "necessary" for the competitor). The Act's leasing provisions, were thus designed to promote competitive outcomes, not simply to deter anticompetitive behavior. A purely deterrent rule would have been superfluous: existing antitrust laws accomplish that purpose, and Congress expressly incorporated those antitrust protections into the Act. Pub. L. No. 104-104, § 601, 110 Stat. 143 (Feb. 8, 1996) reprinted at 47 U.S.C.A. § 152 Hist. and Stat. Notes (West Supp. 1998).

In framing unbundling rules that fulfill the legislative purpose of promoting rapid competition, the Commission now has the benefit of three years of experience with the Act. That experience powerfully endorses Congress' judgment that the combination of preempting state laws preserving local monopolies and antitrust enforcement together are not sufficient to open local markets promptly. Through legal challenges, real and fabricated technical difficulties, and foot-dragging, the ILECs have succeeded in delaying application of the Act's leasing provisions. The result has been the very state of affairs Congress legislated to avoid. Despite the elimination of legal barriers to entry, serious competition has developed at a snail's pace, and only in a very few business markets. Uniform, bright-line, and comprehensive rules for unbundling network elements are, necessary to overcome mechanical and procedural hurdles to competition.

In articulating a "limiting standard" for determining which network elements should be unbundled, the Commission must take into account sources for those elements other than the ILEC network. Iowa Util. Bd., 119 S. Ct. at 734. The record in this proceeding will establish that new entrants continue to require access to a core group of ILEC elements on a national basis because no alternate sources provide adequate substitutes. ILEC elements are needed because new entrants must interconnect with ILEC networks, or because there is not yet a wholesale market for those elements and the costs and delay inherent in self-provisioning are more than sufficient to frustrate the development of local competition. Equally important, competitors without access to certain ILEC elements are frequently impaired even where they could obtain the same elements standing alone from other sources because there is no cost-effective or technically feasible method to integrate the separately obtained element with those monopoly elements of the ILEC network (most significantly the loop) upon which competitors still must rely. Therefore, even where these alternate sources theoretically exist, CLECs will be impaired without access to ILEC elements unless the alternate sources are interchangeable with the ILEC source, i.e., unless it is as feasible to use the alternate source as it is to use the ILEC source.

In sum, in the absence of national rules requiring the unbundling of a core group of network elements on a uniform basis, the ability of new entrants to compete will be materially diminished such that their efforts to provide local service will be impaired for purposes of § 251(d)(2) of the Act.

II. DEFINING NETWORK ELEMENTS

A. The Commission Should Identify UNEs on a Nationwide Basis.

[14, 38] MCI WorldCom agrees with the Commission's tentative conclusion that it "should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis." Second FNPRM ¶ 14. The Commission's judgment in the Local Competition Order that such rules are necessary is sound and is consistent with the Supreme Court's decision. See Local Competition Order ¶¶ 53-62, 226-248.[5] The Supreme Court faulted the Commission for failing to define "impair" and "necessary" in a meaningful way, and in particular required the Commission to consider "the availability of elements outside the

5/ "We find nothing in the Supreme Court's decision that calls into question our decision to establish minimum national unbundling requirements." Second FNPRM ¶ 14.

network." Iowa Utils. Bd., 119 S. Ct. at 736. It did not, however, suggest what conclusion the Commission should reach after redefining those terms and undertaking that inquiry. Critically, the Supreme Court did not take issue with the findings and conclusions in the Local Competition Order that considered and determined the need for elements defined on a national basis.

First, such national rules are clearly contemplated by the statute. 47 U.S.C. § 251(d)(2) specifies that the Commission shall "determin[e] what network elements should be made available for purposes of subsection (c)(3)." If Congress intended local unbundling rules, or a rule which did not specify precisely "what network elements should be made available," it would not have charged the federal agency with coming up with a list. In addition, the § 271 competitive checklist identifies core network elements that Congress believed to be crucial to the goal of opening local markets to competition under any set of market conditions. 47 U.S.C. § 271(c)(2)(B). Congress evidently concluded that such core network elements were properly identified on a national basis. The Commission must retain for itself the role of identifying network elements in keeping with the "national policy framework" envisioned by Congress. Joint Managers' Statement, H.R. Conf. Rep. 104-458, at 1 (1996).

Second, only national unbundled element rules can provide uniformity and predictability in the marketplace that new entrants need to formulate and execute national business plans to offer local telephone service.[6] As the Commission properly found in the Local Competition Order, CLECs must be able to take advantage of economies of scale in order to compete effectively with the incumbent LECs. See Local Competition Order ¶¶ 56, 61, 242.[7] In every

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6/ See Declaration of Judith R. Levine and Ronald J. McMurtrie ("Levine/McMurtrie Decl.") (attached hereto as Tab 1) ¶ 4.

7/ See Declaration of John E. Kwoka, Jr. ("Kwoka Decl.") (attached hereto as Tab 2); Declaration of Mark T. Bryant ("Bryant Decl.") (attached hereto as Tab 3) ¶¶ 10, 13.

State, new entrants can offer ubiquitous local service to all classes of consumers only if they have access to a core group of unbundled network elements.[8/] New entrants that wish to offer service throughout a particular region or nationwide are impaired in any sense of that term without access to a core set of nationally available network elements.[9/] Just as the existence of non-uniform BOC Operations Support Systems (OSS) impairs provisioning of service for a national carrier such as MCI WorldCom,[10/] so too, a lack of nationally-available elements will impair MCI WorldCom in its efforts to offer nationwide mass markets local telephone service.[11/] By providing uniformity and predictability for CLECs' business plans, national unbundling rules will significantly lower barriers to entry for CLECs and increase the benefits of entry for consumers.[12/]

Regulation that would leave elements to be unbundled on a customer-by-customer, facility-by-facility, or state-by-state basis would necessarily result in protracted and repetitive regulatory litigation, involving state regulators and the courts in endless disputes between

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8/ After three years, it is clear that resale alone will not create ubiquitous competition. Even though technically it is a simpler method of market entry than unbundling, and even though it has been the only practical method of entry available in some jurisdictions, resale remains a very limited service entry vehicle. That potential resellers no longer face substantial non-price barriers to entry from some ILECs in some states but nevertheless do not enter the market suggests that resale pricing frequently is an insuperable barrier to entry. See Kwoka Decl., Tab 2, ¶ 19.

9/ See Levine/McMurtrie Decl., Tab 1, ¶¶ 3-6.

10/ The Commission has found in a related context that the lack of uniform, industry standard interfaces creates a barrier to entry. Memorandum Opinion and Order, In the Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 F.C.C.R. 19985, ¶ 195 (1997) ("Merger Order").

11/ See Levine/McMurtrie Decl., Tab 1, ¶¶ 6-9, 13-16.

12/ See Kwoka Decl., Tab 2, ¶¶ 37-38.

CLECs and ILECs over the proper application of unbundling standards.[13] The ability of CLECs to compete already has been and will continue to be severely impaired if individual CLECs were forced constantly to ask regulators and courts to resolve such disputes. See Local Competition Order ¶ 242. Moreover, a state-by-state approach, in addition to sacrificing the uniformity of national rules, would produce rules that fail to reflect actual market conditions. As the Commission has previously concluded, differences in market conditions do not coincide with state boundaries. See id., ¶ 59.[14]

The heavy costs of a state-by-state approach to making unbundling rules have been illustrated by the experience of the past several years. In its Local Competition Order, the Commission declined to order nationwide unbundling of contain elements; including subloop elements and dark fiber, leaving those unbundling decisions to the States. See id., ¶¶ 391, 450. The ILECs then predictably refused to provide access to those network elements (or to provide access on reasonable and nondiscriminatory terms), resulting in dozens of state commission arbitrations and subsequent federal lawsuits around the country as CLECs attempted to gain access.[15] That litigation still is not concluded, and regardless of the substance of the various state

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13/ See, e.g., Levine/McMurtrie Decl., Tab 1 ¶ 8.

14/ Kwoka Decl., Tab 2, ¶ 37.

15/ Decided cases in which the district courts have considered dark fiber or subloop unbundling claims (or both) include: MCI Telecommunications Corp. v. GTE Northwest, Inc., Civ. No. 97-1687-JE, 1999 WL 151039 (D. Or. Mar. 17, 1999); US West Communications, Inc. v. Thoms, No. 4-97-CV-70082 (S.D. Iowa Apr. 19, 1999); US West Communications, Inc. v. Garvey, No. Civ. 97-913 ADM/AJB (D. Minn. Mar. 31, 1999); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., No. 97-76, 1999 WL 166183 (E.D. Ky. Mar. 11, 1999); MCI v. Bell-Atlantic, 36 F. Supp. 2d 419 (D.D.C. 1999); US West Communications, Inc. v. AT&T Corp., Nos. A1-97-085, 082 (D.N.D. Jan. 8, 1999); US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 31 F. Supp. 2d 839, (D. Or. 1998); GTE California Inc. v. Conlon, No. C97-1757SI (N.D. Cal. Sept. 29, 1998); MCI Telecommunications Corp. v. Pacific Bell, No. C97-0670SI (N.D. Cal. Sept. 29, 1998); Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc., No. A97-CA-132SS, 1998 WL 657717 commission rulings, MCI still does not have access to dark fiber. Moreover, the outcomes have been inconsistent from one state to another, for reasons having nothing to do with geographic or market differences in the States. The result has been that CLECs have been unable to formulate any national or regional strategies that rely on use of dark fiber or subloop elements. This is not a model the Commission should adopt for all elements.

The ILECs have consistently opposed any requirement that they lease elements of their network at cost-based rates, arguing that leasing would on the one hand discourage competitors from provisioning their own facilities, and, on the other hand, would create a disincentive for the ILECs to make capital improvements and invest in innovative technologies. CLECs, however, have an overwhelming incentive to avoid reliance on ILEC facilities whenever possible. MCI WorldCom, for example, self-provisions as many network elements as is feasible to minimize reliance on others, and in particular seeks to avoid reliance upon dominant incumbents who have every reason to undermine MCI WorldCom's ability to compete.[16/] Indeed, the ILECs have this argument backwards. Only by being allowed to lease facilities will MCI WorldCom generate sufficient revenues and customers to warrant the construction of new facilities. In the real world, leasing is not a deterrent to facilities construction; it is a necessary precondition to such construction.[17/] Because the availability of unbundled network elements at cost-based rates

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(W.D. Tex. Aug. 31, 1998); MCI Telecommunications Corp. v. US West Communications, Inc., No. C-97-1508R (W.D. Wash. July 21, 1998); US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, No. C-97-1320R (W.D. Wash. July 21, 1998); MCImetro Access Transmission Services, Inc. v. GTE Northwest, Inc., No. C-97742-WD (W.D. Wash. July 7, 1998); MCI Telecommunications Corp. v. Bell Atlantic-Virginia, Inc., No. 3:97CV629 (E.D. Va. July 1, 1998); MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 7 F. Supp. 2d 674 (E.D.N.C. 1998).

16/ See Kwoka Decl., Tab 2, ¶¶ 20, 29, 35; Levine/McMurtrie Decl., Tab 1, ¶ 16; SWBT, 1998 WL 657717, at *11; Local Competition Order ¶ 685.

17/ Levine/McMurtrie Decl., Tab 1, ¶ 17.

cannot outweigh CLECs' strong interest in controlling their own networks, there is little danger that national unbundling rules will slow the development of facilities-based competition. To the contrary, no CLEC will gamble its viability by relying on the long-term cooperation of its dominant rival. See infra pp. 26-27. The proof of this is the recent experience in New York. In that state leasing at competitive rates is possible, and MCI WorldCom is able to offer competitive Mass Market Service.[18] That has not deferred facilities build out. To the contrary, there may be more CLEC facilities in New York than in any other state. Declaration of John Wimmer, ("Wimmer Decl.") (attched hereto as Tab 4) ¶ 31.

Nor will a uniform leasing rules have any effect on ILEC investment in innovative technology. In the first place, most of the innovation and high-risk investment that takes place in the telecommunications industry is undertaken by equipment vendors, and not by the ILECs who are their customers. And when ILECs do make innovative changes in their network, they typically do so on a limited, experimental basis, and not throughout their network. They do not usually invest large sums of money in high-risk enterprises, so there is little chance that such investment could be deterred by a rule that facilitated leasing. Finally, the Commission's TELRIC methodology calls for state commissions to apply a risk-adjusted return on capital as part of the TELRIC rate. Thus, the lease price appropriately rewards investment risk, and there is no reason to believe leasing would discourage high-risk investment.[19]

Consistent with the Supreme Court's mandate, this Commission must, of course, articulate and apply a definition of § 251(d)(2)'s impairment standard that takes into account sources of network elements other than the ILEC networks. Such a definition is properly based

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18/ Id ¶ 17 (citing number of lines).

19/ See Kwoka Decl., Tab 2, ¶ 25.

on a nationwide assessment of market entry conditions that considers whether, to what extent, and where alternative sources of network elements are available. The record evidence submitted by MCI WorldCom and in this proceeding generally will establish that, with negligible exceptions nationwide, there is no wholesale market for network elements, that CLEC self-provisioning is currently prohibitively costly and time-consuming, and that where either of these alternatives exist in theory, the lack of connectivity and interchangeability of elements renders their use impracticable. See, e.g., infra, Declaration of Dennis Herold, Joseph Stockhausen, and Roy Lathrop ("Herold/Stockhausen/Lathrop Decl.") (attached hereto as Tab 5) ¶¶ 6-12. Levine/McMurtrie Decl., Tab 1, ¶¶ 9, 15. In view of nationwide barriers to entry for the provision of mass market services, combined with the barriers that would be created by requiring case-by-case, state-by-state determinations as to unbundling, the Commission should enact national unbundling rules.

Indeed, based on such a factual record, the only sensible rule is one that can be applied to the majority of cases in which there is no alternative to the ILECs' elements. There are no doubt sporadic instances in which a particular CLEC in a particular location seeks access to a particular element even though it could as a practical matter, self-provision. But the Commission is charged with devising a sensible regulation that can be applied with the least amount of regulatory involvement and risk of litigation. A rule that generally leads to the correct result and does so without any delay or confusion is far superior to a rule designed to respond to the infrequent case and will inevitably will lead to extensive delay and uncertainty in all cases. The record and the Act powerfully support the Commission's tentative conclusion that it should define a minimum set of elements that must be unbundled on a nationwide basis.

B. The Commission Should Establish a Process For Modifications to Its Unbundling Requirements.

[11, 36-39] Because any definition of "impair" and "necessary" must take into account the availability of elements outside of the ILECs' networks, the Commission's core list of unbundled elements may evolve over time. The Commission should continue to "recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry," Local Competition Order ¶ 58, and adopt a mechanism for modifying the list of unbundled network elements. However, for the same reasons that the Commission should create a uniform national list of unbundled elements, that modification mechanism should not operate on a case-by-case or state-by-state basis. Rather, the Commission itself should reexamine, after a fixed period of time, its decisions to require particular network elements to be unbundled nationwide.

Section 251(d)(2) requires the Commission to consider its statutory standards -- as well as the other relevant factors -- before deciding that a network element should no longer be subject to unbundling requirements. See Iowa Utils. Bd., 119 S. Ct. at 736 ("[Section 251(d)(2)] requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."). In addition, § 10 of the Act expressly requires the Commission to enforce the unbundling requirements of § 251(c) "until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d) (limiting forbearance authority of § 160(a)) (emphasis added). Neither a "sunset" provision, in which unbundling obligations would be eliminated without further action of the Commission, nor a delegation of this determination to the States, which would also obviate Commission action, can be reconciled with the Act's language, its pro-competitive purpose, or the realities of the marketplace.

First, no evidence on the record suggests that the Commission can predict today with any accuracy that conditions will have changed sufficiently at some point in the future such that a particular unbundling obligation will no longer be necessary. Neither should the Commission establish a mechanism that eliminates unbundling obligations upon the occurrence of certain events defined in advance. A conditional sunset rule that would apply only at some future date would necessarily be so complex as to be administratively unworkable and would not satisfy the Commission's duties under § 251(d)(2).[20/] An absolute sunset provision would create precisely the wrong incentives: in the absence of Commission review, an ILEC is free to slow roll compliance with the Act's procompetitive requirements and still get the benefit of automatic sunset. The Commission simply must at a future date review its unbundling assessments here and make a determination as to whether suggested alterations comply with the Act.

Second, the Commission may not delegate review of its unbundling requirements to the States. To do so would be to give individual states the ability to opt out of national unbundling rules promulgated by the Commission, contradicting § 251(d)(2) and § 10 and undermining the national framework Congress intended. See supra p. 5. Once a national framework has been put in place by the Commission, it should only be modified, if necessary, by the Commission on a nationwide basis, not eroded in piecemeal fashion by individual States acting independently.[21/]

20/ Attempting to define such conditions in advance will not create new incentives for the ILECs to facilitate competition. ILECs already have the incentive of interLATA entry to spur their efforts to facilitate interconnection and provide access to elements on nondiscriminatory terms. Giving carriers the opportunity not to participate in a wholesale market after one has developed will not act as a further incentive. In a world in which there is a wholesale market for an element, in which wholesale prices have been driven close to cost by competitive forces, and in which there are no barriers to CLECs' self-provisioning of the element, the ILECs surely would wish to be part of that market.

21/ Of course, States are free to take further pro-competitive steps beyond the actions of this Commission by unbundling elements in addition to those unbundled in this proceeding. See Local Competition Order ¶ 244. See infra Tab 9 for MCIWorldCom suggested text for

Review of the unbundling requirements by the Commission after a fixed period of time better serves the purposes of the Act than any process of *ad hoc* review by the States at the request of incumbent LECs. A process in which reconsideration of unbundling requirements can be initiated by incumbents before state commissions would result in constant and duplicative regulatory litigation, plunging CLECs into uncertainty and anticompetitive delay.

The period of time before a reevaluation by the Commission of the unbundling rules should be sufficiently long to enable CLECs to plan their business strategies with reasonable certainty and to ensure that regulatory litigation does not bring competition to a halt just as it is getting started. MCI WorldCom proposes that a period of approximately three years would provide the necessary certainty while allowing a reasonable opportunity for modification of the rules in accordance with changing industry conditions. Kwoka Decl., Tab 2, ¶ 38.[22]

Because such a reexamination would relate to modification of Commission rules then in effect, the presumption should be that existing unbundling requirements will remain unaffected unless it is affirmatively shown that changed conditions warrant removal of a network element from the existing list. This approach is consistent with the Act's goal of promoting local competition throughout the nation for all classes of customers, as it ensures that all unbundling obligations remain in place until they are no longer needed. A presumption of continued unbundling is also appropriate because, as discussed above, the risks associated with leaving a

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replacement of the Commission's Rule 51.317.

22/ After its initial review, the Commission could schedule subsequent reviews to coincide with its § 11(a)(2) biennial public interest review of all of its regulations. See 47 U.S.C. § 161. That provision -- requiring a review of the Commission's regulations for compliance with a public interest standard -- schedules those assessments for even numbered years. Plainly, a reassessment of the unbundling rules for compliance with the Act will be premature in 2000.

particular unbundling obligation in place too long are less than the risks associated with removing such an obligation prematurely.

If the Commission determines that the right to access to a particular network element should be withdrawn or that some conditional rule has become appropriate, it should expressly acknowledge that unbundling obligations contained in existing interconnection agreements will nevertheless remain in effect until those agreements expire. See MCI Telecommunications Corp. v. GTE Northwest, Inc., No. 97-1687-JE, slip op. at 9 (D. Or. Apr. 21, 1999). By making it clear that modifications to its rules are prospective only, and that existing interconnection obligations should not be disturbed, the Commission will avoid disruption of established CLEC business plans and ensure a "grace period" within which all parties may prepare for the altered regulatory environment.

C. Factors Relevant To the Commission's Identification of Unbundled Network Elements.

1. Burden of Proof

[12] In its determination of which network elements should be subject to unbundling requirements, the Commission has discretion to reach any conclusion that is supported by the substantial evidence on the record, and that is based on a reasonable interpretation of § 251(d)(2) and the pro-competitive purposes of the Act. The Commission must have a "rational basis" for its conclusions. See Iowa Utils. Bd., 119 S. Ct. at 736 ("[Section 251(d)(2)] requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements."). On judicial review, the Commission's determinations may be overturned only if arbitrary and capricious. See 5 U.S.C. § 706. Although parties to this proceeding no doubt have an interest in coming forward with record evidence to support their

legal and policy arguments, as a legal matter the only burden is on the Commission to have a rational basis for its decision. The Commission is free to consider all of the evidence without requiring a greater showing by any party or parties.

However, in subsequent proceedings to modify the unbundling requirements the Commission adopts here, parties advocating modification should be required to demonstrate that conditions have changed sufficiently since the initial identification of those elements to warrant the modification. Unlike this proceeding, where the Commission writes on a clean slate, a subsequent proceeding will involve alteration of existing rules. There should be a presumption that the rules remain in effect until it is affirmatively shown that there have been changes in the relevant factual circumstances which warrant a change.

2. Impairment

[17, 18] The ability of CLECs to provide the services they seek to offer is "impaired" within the meaning of § 251(d)(2)(B) if their ability to provide services without a network element is materially diminished. A CLEC's ability to provide services is materially diminished if an ILEC's denial of access to an element, taking into account the availability of the element outside the incumbent's network, either interferes with the ability of CLECs promptly to provide services they seek to offer to any class of customers in any geographic area, or provides a significant competitive advantage to the ILEC.

This definition of impairment is fully consistent with judicial decisions interpreting the term "impair." Courts frequently apply the standard legal dictionary definition as "'[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" Humana Inc. v. Forsyth, 119 S. Ct. 710, 717 (1999) (quoting Black's Law Dictionary 752 (6th ed. 1990)); see id. ("to 'impair' a law is to hinder its operation or 'frustrate [a] goal' of that law").[23/] The term "impair" is generally read to mean something less than total destruction or disability of the object at issue. See, e.g., id. at 716 (declining to define "impair" as synonymous with invalidate, supersede, or displace).[24/] Accordingly, the impairment standard in § 251(d)(2) cannot be interpreted to require that unavailability of a network element makes it impossible for any CLEC to provide service. Congress established a higher threshold for access to proprietary elements than for nonproprietary elements, contrasting the necessary standard for the former with the impairment standard for the latter. In this context, "impair" is plainly intended to be a less restrictive standard than "necessary." A CLEC, therefore, may be impaired even if access to the elements in question is not necessary to its provision of service.

In determining whether service would be impaired under this definition, the Commission should consider, inter alia, several categories of factors:

- Aggregate impact of unavailability of individual elements: The Commission should consider the aggregate effect of unavailability of two or more elements on CLECs' ability to provide service.

- Alternate source provisioning: The Commission should consider whether an element is currently available for all CLECs as a group in commercially reasonable and sufficient quantity from at least two other sources, including third party and self-provisioning sources. Availability from more than two sources is generally important to ensure reasonable price, quality, and availability of an element.

23/ In re Henderson, 18 F.3d 1305, 1310-11 (5th Cir. 1994); Pure Waters Inc. v. Michigan Dep't of Natural Resources, 883 F. Supp. 199, 205-06 (E.D. Mich. 1995), aff'd, 82 F.3d 418 (6th Cir. 1996); Runnebaum v. NationsBank, 123 F.3d 156, 168 (4th Cir. 1997) (quoting standard dictionary definitions, such as to "make worse by or as if by diminishing in some material respect," and "a decrease in strength, value, amount, or quality") (internal quotations omitted); In re Barakat, 99 F.3d 1520, 1527 (9th Cir. 1996) (claims under bankruptcy plan are "impaired" if creditor's rights are in any way altered).

24/ Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 411 (1983) ("[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment" under the Contracts Clause); Ross v. City of Berkeley, 655 F. Supp. 820, 827 (N.D. Cal. 1987) (same).

- Relative cost and quality of alternate sources provisioning: The Commission should consider the costs of third party or self-provisioning options relative to ILEC provisioning costs. For example, if CLECs pay materially more than the ILEC pays for an element that comprises a significant part of CLECs' total cost of doing business, such a significant cost difference might well put CLECs at a significant competitive disadvantage and undermine CLECs' ability to compete profitably without access to the element from the ILEC at cost-based rates. Similarly, if CLECs cannot otherwise obtain an element the quality of which does not allow the CLEC to provide service that is at least equivalent to the ILEC's, the failure to get access to the ILEC's element "impairs" CLECs' ability to compete on reasonably equal terms.

- Non-cost constraints on alternate source provisioning: The Commission should consider the extent of the delay inherent in the use of alternate source provisioning, the effect that delay will have on CLEC market entry plans, and the ability of vendors to produce sufficient quantities of the element to meet CLECs' needs in the event they were denied access to the element from the ILECs. In addition, the Commission should consider that, even if a particular facility or particular equipment can be obtained on a stand-alone basis from sources other than the ILEC, it may be impractical or uneconomic for a CLEC to use that facility or equipment to serve various particular classes of customers. For example, the availability and price of collocation space, both of which are under control of the incumbent LEC, may prevent CLECs from cost-effectively serving customers with their own switches if CLECs are dependent upon ILEC loops. Moreover, the Commission should consider issues such as the ILECs' ability to detach loops from their own switches, and re-attach them to the CLECs' switches in a commercially reasonable manner.

- Impact of alternate sources on network operation: The Commission should consider how obtaining the element from alternate sources would affect the total cost of constructing and operating a network, and not focus solely on the stand-alone cost of the element.

Taking into account this definition and these factors, some non-exhaustive examples illustrate the appropriate interpretation of § 252(d)(1). First, CLECs' ability to offer service is "impaired" under this standard if their inability to obtain an element from the ILEC means that as a practical matter, it would be more difficult for them to provide local services at prices that are competitive with the prevailing retail prices while permitting them to earn a reasonable return on capital. If unavailability of a network element produces only a slight decline in profits, while still allowing competitors to compete and recover a reasonable return on capital, the ability of

CLECs to provide service would not be impaired. Iowa Utils. Bd., 119 S. Ct. at 735. But if unavailability threatens the ability of a CLEC to earn a reasonable return on capital in offering services generally, or for any class of customers, or in any geographic area (regardless of the absolute size of the additional cost involved), CLECs should have unbundled access to the element. Kwoka Decl., Tab 2, ¶¶ 32-33.

Second, impairment is not only about cost. CLECs also are impaired if lack of access to a network element makes them unable to provide a feature, capability, or a competitive quality of service, and thereby diminishes their ability to provide service in the local market. If inability to obtain access to an element prevents CLECs from providing a feature of local service that customers expect from their local telephone company, they cannot provide service of comparable quality, and their ability to compete is impaired within the meaning of § 251(d)(2).

Third, impairment would also exist if lack of access to a network element would delay CLECs' ability to provide service to any class of customers or geographic area. Of course, most self-provisioning might take longer than leasing, and inconsequential delays would not constitute impairment. But if the time needed to complete design, acquisition, construction, and testing of new facilities would materially delay CLECs' market entry, CLECs must be able to lease network elements to avoid the delay and enable the prompt initiation of service. One of the principle purposes of the Act's unbundling requirements, after all, is to allow carriers to compete promptly rather than being forced to wait the long period of time it would take to duplicate the extensive physical plant constructed by the ILECs over the last century.

3. Proprietary Elements

[16, 19] CLEC access to a proprietary element is "necessary" if, taking into account the availability or unavailability of the element outside the incumbent's network, the inability to get the element from the ILEC would seriously impair or obstruct CLECs' ability to compete against

the ILEC for any group of customers in any geographic area by giving the ILEC a competitive advantage that CLECs cannot otherwise overcome on a timely basis. The unavailability of a network element need not completely preclude CLECs from competing.

This definition maintains an appropriate distinction between the standards in subsections 251(d)(2)(A) and 251(d)(2)(B). See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 n.33 (8th Cir. 1997) (FCC should not "inappropriately conflate" requirements) aff'd in part, rev'd in part, sub nom. AT&T Corp. v. Iowa Utils. Bd. 119 S. Ct. 721 (1999). This "necessity" standard entails a more significant degree of impairment or obstruction to justify unbundled access to proprietary elements than the "impairment" standard demands for non-proprietary elements. The difference is one of degree, not kind, and the focus of the inquiry in each case is on whether CLECs can effectively and efficiently provide services without unbundled access to the element.

This definition is supported by judicial decisions interpreting the term "necessary" and is well within the FCC's discretion to interpret the term consistent with its usual meaning, its context, and the statutory purposes. As the Supreme Court long ago stated, the term "necessary" is susceptible to different meanings and should therefore be defined with regard to its statutory or constitutional context. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414-15 (1819). See Armour & Co. v. Wantock, 323 U.S. 126, 129-30 (1944) (rejecting rigid reading of term "necessary"). Given the wide range of legal uses of the term, judicial interpretations of "necessary" have run the gamut from "convenient" or "useful" to "essential" to "indispensable."

Courts generally interpret the term liberally.[25] The Supreme Court has rejected the notion that "necessary" must be equated with "indispensable." Armour, 323 U.S. at 130.

[15]b. Proprietary. Section 251(d)(2)(A) makes necessity an issue only with respect to "such network elements as are proprietary in nature." Local Competition Order ¶ 282 (necessity standard applies to "proprietary elements (e.g., elements with proprietary protocols or elements containing proprietary information)"); id. ¶ 283 (necessity standard applies when "the element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis"). Few elements are proprietary or have proprietary aspects.[26] Despite their notable willingness aggressively to advocate legal and factual claims, the ILECs have not claimed in any of the dozens of § 252 cases in district courts around the country that the elements required to be unbundled pursuant to the Commission's Local Competition Order are in any way proprietary.

25/ E.g., M'Culloch, 17 U.S. at 413-14 ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."); Commissioner v. Tellier, 383 U.S. 687, 1120 (1966) ("ordinary" and "necessary" expenses need only be "appropriate and helpful"); United States v. Hernandez-Urista, 9 F.3d 82, 83-84 (10th Cir. 1993) (subpoena is "necessary" if witness' presence is "relevant, material, and useful"); Federal Labor Relations Authority v. United States Dep't of Defense, 984 F.2d 370, 372-73 (10th Cir. 1993) (deferring, under Chevron, to FLRA's interpretation of "necessary for full and proper discussion . . . of collective bargaining" to include union's right to employees' home addresses, because communication with workers at home is important even though alternative avenues of communication exist); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1261-62 (6th Cir. 1981) (business necessity defense to Title VII disparate impact claim need not show indispensability; "[r]ather, the practice must substantially promote the proficient operation of the business").

26/ See Local Competition Order ¶ 388 ("loop elements are, in general, not proprietary in nature"), id. ¶ 393 ("no evidence of proprietary concerns with unbundled access to the NID"), id.¶ 419 ("the vast majority of parties that discuss unbundled local switching do not raise proprietary concerns with the unbundling or either basic local switching or vertical switching features"), id. ¶ 446 ("the record provides no basis for withholding these [interoffice] facilities from competitors based on proprietary considerations").

The Local Competition Order defined the term "proprietary" by example in a reasonable way. Notably, none of the ILECs challenged the Commission's existing definition before either the Eighth Circuit or the Supreme Court, and its meaning is therefore settled. The Commission has explained that an element is less likely to be proprietary if it already is offered on an unbundled basis, id. ¶¶ 446, 490, or if it adheres to industry-wide, rather than company-specific, standards. Id. ¶¶ 481, 490. An element is more likely to be proprietary if it utilizes technology specially tailored to the incumbent's individual network. Id. ¶ 497 n.1157. Even if an element contains proprietary information, new entrants may be able to gain access to the necessary features or functions without gaining access to the proprietary information (e.g., when the new entrant can use a system without receiving direct access to the incumbent's proprietary method of data entry). Id. ¶¶ 284, 498; see also id. ¶ 481 n.1120.

If the Commission seeks to promulgate a more precise definition, a network element should be defined as "proprietary" under § 251(d)(2)(A) if: (1) providing unbundled access to the network element reveals confidential information in which the incumbent LEC has a legally protected interest under state or federal law; and (2) the incumbent LEC does not provide the network element to any third parties. Under this definition, the network element is "proprietary" only if confidential information is revealed to CLECs when they gain access to the particular element. Therefore, if a network element contains what ILECs assert to be confidential information, but access to that information is not accessible by CLECs when they gain access to the element, the entire element is not "proprietary" for purposes of § 251(d)(2)(A).

Moreover, the network element is only "proprietary" if it contains confidential information in which the incumbent LEC has a legally protected interest under state or federal law. Therefore, if the interfaces, functions, features and capabilities sought by requesting CLECs are defined by recognized industry standard-setting bodies, are defined by Telcordia general requirements, or otherwise are widely available from vendors, the network element cannot be considered "proprietary" because any information contained by the element is neither confidential nor entitled to legal protection under state or federal law. Also, under this definition, the network element is only "proprietary" if the ILEC has a legally protected interest in the element's confidential information under either state or federal law.

Finally, a network element is "proprietary" only if the ILEC does not provide the element to any third parties, including competing carriers and end users. Information contained by the element cannot be considered confidential if the ILEC reveals this information to other parties.

4. Other Factors

Section 251(d)(2) identifies "necessary" and "impair" as two factors that the Commission must "consider," "at a minimum," without requiring the Commission to make either of them dispositive. The Commission is free to identify and give the appropriate weight to other factors as it sees fit, and it should also consider factors other than impairment and necessity in determining which elements should be unbundled. Thus, the Supreme Court was not called upon to address other factors or their relative importance, and it did not do so. Its holding was a narrow one concerning only the substance of the "impair" and "necessary" standards, and not the role they should play in a final determination of which element should be unbundled. See Iowa Utils. Bd., 119 S. Ct. at 734-36.

If denial of access impairs the ability of new entrants to compete, that alone is sufficient to indicate that the element should be unbundled. Because of the pro-competitive policies that animate the Act, however, the converse is not necessarily true: lack of impairment (or necessity in the case of proprietary elements) does not automatically mean that ILECs have a right to deny access. If an element does not meet the impairment or necessity standard, it still is properly unbundled for at least any of the following reasons.

The § 271 Checklist. In deciding whether CLECs need access to a network element, the Commission can and should consider whether the element is included in the competitive checklist in § 271(c)(2)(B) of the Act. Inclusion of an element in the competitive checklist is strong evidence that Congress believes it is mandatory for CLECs to have access to the element on reasonable and nondiscriminatory terms. The § 271 checklist includes local loop transmission (item iv), transport (item v), switching (item vi), access to DA services and operator call completion services (item vii), and access to databases and associated signaling necessary for call routing and completion (item x).

The inclusion of these elements in the checklist reflects Congress' judgment that unless and until these core items are available on reasonable and nondiscriminatory terms to CLECs, local competition cannot develop. Both § 251 and § 271 share the same goal of opening up local markets as quickly as possible to broad-scale competition. That these items are explicitly spelled out in § 271 and not in § 251 simply reflects Congress' judgment that whatever the Commission might conclude about future unbundling, it was critical that at least these core components of the network always be available for leasing. Thus, the checklist is irrefutable evidence of Congress' judgment that the ability of carriers to offer local service on a reasonably level playing field in competition with BOCs would necessarily be impaired without access to each checklist item.

Ubiquity. Driven by our own interest in spreading construction and marketing costs across as many customers as possible and by consumer interest in all geographic areas in having competitive alternatives, MCI WorldCom's goal is to offer ubiquitous local service. Other CLECs have the same goal. Given this coincidence of CLEC and consumer interest, elements should be unbundled if that would facilitate the ability of CLECs to provide ubiquitous service throughout a state or region. Because of economies of scale, connectivity, and density in providing local service (discussed in more detail below), the inability to provide ubiquitous service raises the costs of CLECs to serve even a more limited group of customers and thereby undermines their ability to compete for all customers. Herold/Stockhausen/Lathrop Decl., Tab 5, ¶ 4; Kwoka Decl., Tab 2, ¶ 29. Accordingly, the fact that in some locations CLECs may have alternate sources of an element does not mean that access to the element from the ILEC should be denied.

Classes of Customers. By the same token, the Commission should consider whether its identification of network elements to be unbundled would facilitate CLECs' ability to offer service to all categories of customers — residential as well as business, and small business as well as large business. Residential and small business customers to which CLECs seek to offer service should be able to enjoy the fruits of competition. Congress intended to foster ubiquitous competitive provision of service for residential and small business users as well as large business users, but in those geographic areas where there are no large businesses that generate heavy traffic, it is all the more infeasible for new entrants to replicate ILEC facilities, at least in the short term. Access to ILEC elements is the only way to foster competitive provision of service to all classes of customers.

Immediate Competition. In unbundling network elements, the Commission should also consider whether unbundling will help CLECs jumpstart local competition. "The Commission's unbundling rules facilitate the competing carriers' access to these [ILEC] networks and thus promote the Act's additional purpose — the expeditious introduction of competition into local phone markets." IUB v. FCC, 120 F.3d at 816; see id. at 811. It is not enough that CLECs may eventually be able to provide service without access to a particular network element. The public interest requires that local competition develop quickly, and competition based on leasing network elements is essential to achieve that goal because it necessarily takes time to deploy a ubiquitous network. Therefore, the Commission should consider whether CLECs have a practical need for specific network elements at any given moment.

Product Differentiation. Network elements should be unbundled to enable CLECs to differentiate their service from that of the ILECs. One of the principal goals of the 1996 Act is to promote innovation and diversity. That goal can be achieved only if network elements are unbundled in a way that permits CLECs to use them to provide new features and capabilities. Indeed, § 251(d)(2) itself focuses on the services a CLEC "seeks to offer," not on the services that ILECs currently offer.

Economies of Scale, Connectivity, and Density. Network elements should be unbundled to allow CLECs to benefit from economies of scale, connectivity, and density comparable to those of the ILECs with their huge customer base and ubiquitous network. Provision of telecommunications services involves substantial economies of scale, connectivity, and density, and one important purpose of the unbundling provision of the 1996 Act is to permit CLECs to compete with the same economies as ILECs even in the early stages of local competition when CLEC customer bases are necessarily small and CLEC networks are necessarily limited in their reach. Local Competition Order ¶¶ 11, 232, 316, 340.

For example, a network element is useful to a CLEC only as part of a combination of elements integrated into a network. It makes no sense to consider unbundling without considering how the element is to be deployed within a network, and whether it can be cost-effectively deployed in light of scale, connectivity, and other economies. Access to unbundled ILEC network elements, especially when used in combination with other ILEC elements, has important efficiency implications precisely because the ILEC network is configured for efficient connections between the various elements in the network. Kwoka Decl., Tab 2, ¶ 13. A CLEC may not be able to achieve equally efficient connectivity between elements if it connects ILEC network elements with elements from a CLEC network because the network architecture was not configured to accommodate efficient connection by other parties. The utility of a network element from another source is limited if significant costs must be borne in order to connect that element to other ILEC elements for which alternative sources do not exist. Network elements and combinations thereof should therefore be available if CLECs cannot otherwise achieve the efficiencies in the ILEC network.

CLEC Independence of ILECs. In deciding whether to unbundle an element, the Commission should consider that CLECs have strong reasons to minimize reliance on ILECs, and so there is little reason to fear that an opportunity to lease will discourage CLECs from self-provisioning whenever that is possible. As courts and this Commission have recognized, "independence from the incumbent LEC" is a powerful incentive for new entrants to build their own networks. Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., No A 97-CA-132 SS, 1998 WL 657717, at *11 (W.D. Tex. Aug. 31, 1998) ("SWBT"); Local Competition Order ¶ 685.

The reasons for this incentive are manifest. No rational company would pursue a business strategy that makes it dependent on the long-term cooperation of a single dominant rival. See Kwoka Decl., Tab 2, ¶¶ 20, 24. As the Commission has found, and as experience confirms, an ILEC has both "the incentive and the ability to engage in many kinds of [non-price] discrimination. For example, [it] could potentially delay providing access to unbundled network elements, or . . . provide them to new entrants at a degraded level of quality." Local Competition Order ¶ 307. If the CLEC is not able to provide in a timely fashion the quality of service promised in its marketing campaign because of ILEC non-price discrimination, it will not only place the costs associated with the launch at risk, it will also substantially raise the costs of capturing customers in the future because its reputation will be harmed. Self-provisioning minimizes these risks. Additionally, a competitor that needs to rely on the ILEC for provisioning elements must provide critical information to its dominant competitor about its business plan. No CLEC would do so unless it had no other choice.[27/]

Moreover, new entrants will want to build their own networks in order to be "first to market" with new network technologies that provide more innovative services to consumers. See IUB v. FCC, 120 F.3d at 817 ("the increased incentive to innovate resulting from the need of a carrier to differentiate its services and products from its competitors' in a competitive market will override any theoretical decreased incentive to innovate resulting from the duty of a carrier to allow its competitors access to its network elements"). Also, many customers seek out new entrants as independent sources of supply to provide redundancy in case of ILEC network failure, providing added incentive for CLECs to use their own facilities wherever it is feasible.

New entrants also have significant financial inducements to build their own networks. The Commission's pricing methodology takes "the location of an incumbent's current central offices as a given," even if an efficient new entrant would use fewer switching centers and place them more wisely. Local Competition Order ¶¶ 683-685. "[B]ecause the TELRIC methodology . . . does not assume a perfectly efficient network," new entrants have a further incentive to build their own facilities. SWBT, 1998 WL 657717 at *11; see also Local Competition Order ¶ 685. Moreover, new entrants incur many transaction costs in obtaining and paying for network elements, and they face heavy costs in attempting to monitor and prevent the non-price discrimination identified by the Commission. Examination of the marketplace readily demonstrates that, as a practical matter, CLECs will naturally avoid use of ILEC network elements to the greatest extent possible.

27/ See Levine/McMurtrie Decl., Tab 1, ¶ 17.

D. The 1996 Act Does Not Incorporate Antitrust Law's "Essential Facilities" Doctrine.

[21, 22] The Commission has asked commentators to: (1) describe the essential facilities doctrine; (2) provide comments "on the significance of the essential facilities standard under section 251(d)(2);" (3) cite to relevant legislative history; and (4) describe "how [the "essential facilities" doctrine] should be applied, if at all, to the determination of which network elements incumbent LECs must provide on an unbundled basis pursuant to sections 251(c)(3) and 251(d)(2)." Second FNPRM ¶¶ 21-22. MCI WorldCom has some familiarity with the essential facilities doctrine, having pioneered its application in establishing antitrust liability. See MCI Communications Corp. v. American Tel. & Tel. Co., 708 F. 2d 1081, 1132-33 (7th Cir. 1983). These comments will address the questions in the order the Commission has asked them, and will demonstrate that § 251(d)(2) should not be read as incorporating the essential facilities doctrine.

1. The "Essential Facilities" Doctrine Sets Forth a Standard For Proving Willful Maintenance of Monopoly Power In Violation of the Sherman Act In Certain Narrowly Defined Circumstances.

Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits a monopolist from willfully maintaining its monopoly power through wrongful or predatory acts of monopolization, sometimes referred to as "exclusionary conduct." See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). The "essential facilities" doctrine is a means of proving willful maintenance under Section 2. A firm with monopoly power may be found to have willfully maintained its monopoly if the firm has exclusive or near exclusive control over inputs that are "essential" for the existence of competition between the competitor and the monopolist, and refuses to provide reasonable access to the inputs. See MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983).[28]

The essential facilities doctrine may be seen as a means of preventing a monopolist that has control over an "essential facility" or "bottleneck" from wrongfully "extend[ing] monopoly power from one stage of production to another, and from one market to another." MCI v. AT&T, 708 F.2d at 1132; see also Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 543-45 (9th Cir. 1991); Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139, 149 (4th Cir. 1990). Through control of bottleneck facilities in one market, a monopolist may raise its rivals' costs in an adjacent market, allowing the monopolist to charge elevated prices in the second markets. See Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209, 234-36 (1986).

To establish an antitrust violation under the essential facilities doctrine, a plaintiff must prove, in addition to the other elements of a Section 2 violation: (a) control of an essential facility by a monopolist; (b) a competitor's inability practically or reasonably to duplicate the essential facility; (c) the denial of use of the facility to a competitor; and (d) the feasibility of providing the facility. MCI v. AT&T, 708 F.2d at 1132-33. Some courts applying this test have required antitrust plaintiffs to show that monopolist's control of the facility enables it to completely foreclose its competitors from the market place. Alaska Airlines, 948 F.2d at 544.

28/ An act of monopolization may occur when a monopolist refuses to deal with its competitor without a legitimate business reason for the refusal. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985); accord Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992). The "essential facilities" doctrine is one way of describing circumstances under which a defendant may be liable for "refusing to deal." See, e.g., Patrick J. Ahern, Refusals to Deal After Aspen, 63 Antitrust L.J. 153, 162 (1994).

2. Section 251(d)(2)'s Impairment Standard Cannot Permissibly Be Read as Incorporating the Sherman Act "Essential Facilities" Doctrine.

[21] The essential facilities doctrine has no place here. To be sure, the Supreme Court's decision in Iowa Utilities Board acknowledged the ILECs' argument that § 251(d)(2) codifies "something akin to the 'essential facilities' doctrine of antitrust theory . . . opening up only those 'bottleneck' elements unavailable elsewhere in the marketplace." 119 S. Ct. at 734. But the Court itself did not state any preference for, much less hold, that § 251(d)(2)'s impairment standard should be read as incorporating the essential facilities doctrine. The Commission should not -- indeed cannot -- give § 251(d)(2) that reading. Such a reading is not consistent with the statutory text and structure. Moreover, although some components of an essential facilities case bear superficial similarities to the Act's leasing requirements, e.g., both could involve the furnishing or withholding of part of an incumbent's facilities, the purposes and effects of the two sets of rules are so different that reference to the essential facilities doctrine is irrelevant to the Commission's consideration of the scope of the Act's leasing requirements.

a. The Text and Structure of the Act Make Clear that § 251(d)(2) Cannot Be Read As Incorporating the Essential Facilities Doctrine.

Section 251(d)(2) requires the Commission to consider whether a new entrant would be "impaired" without access to a particular network element. The statute does not require the Commission to conclude that the element is an "essential facility" as that concept is understood in Sherman Act jurisprudence. Indeed, the statutory text and structure make such a reading patently unreasonable.

To begin with, Congress deliberately chose an "impairment" standard for unbundled elements generally, not a standard that requires a showing that access to an element is "essential." As previously demonstrated, a new entrant is "impaired" in the ordinary sense of that term even if an element is not essential to the new entrant's ability to compete. That the "impairment" standard does not impose an "essential facilities" requirement is confirmed by the fact that Congress imposed a stricter "necessity" standard for those few network elements that are proprietary in nature. As a matter of logic and plain English, the "impairment" standard is more lenient that the "necessity" standard. By the same token, § 251(d)(2)'s necessity standard is itself more lenient than the standard an essential facilities plaintiff must meet. Thus, the text of § 251(d)(2) itself provides a complete answer to the Commission's question.

Furthermore, imposing an essential facilities requirement would be inconsistent with other provisions of the Act, as well as its overall structure. Congress specifically intended that the 1996 Act would augment, not replace, traditional antitrust rules. To promote its goal of true competition in local telephone markets, Congress gave entrants new statutory rights under the Act <u>and</u> preserved entrants' remedies under the antitrust laws. Under the Act, Congress required incumbents to cooperate with entrants through three different means: interconnection, resale, and leasing of network elements. 47 U.S.C. § 251(c)(2)-(4). In addition, Congress expressly preserved entrants' antitrust remedies through an explicit saving clause that acknowledged the full applicability of the antitrust laws to local exchange markets. Section 601(b)(1) of the 1996 Act provides that nothing in the Act "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, ¶ 601, 110 Stat. 143 (Feb. 8, 1996) reprinted at 47 U.S.C.A. § 152 Hist. and Stat. Notes (West Supp. 1998).

Reading the Act to limit the scope of § 251(d)(2) would violate the well-settled rule of statutory construction that courts must give effect to all parts of a statute where possible. <u>See</u> <u>Bowsher v. Merck & Co.</u>, 460 U.S. 824, 833 (1983); <u>Fidelity Federal. Sav. & Loan Ass'n v. de la Cuesta</u>, 458 U.S. 141, 163 (1982). By expressly preserving entrants' antitrust rights in the Act, Congress indicated that it was granting new rights and remedies under the Act, not merely codifying previously existing ones. If Congress intended simply that antitrust standards govern the leasing of network elements from incumbents, it need not have passed §§ 251(c)(3) and 251(d)(2). Congress plainly intended that §§ 251(c)(3) and 251(d)(2) have broader scope than the essential facilities doctrine. Had Congress intended to limit the scope of the local competition provisions to narrowly defined essential facilities, it would have done so explicitly.

b. The essential facilities doctrine serves an entirely different, and far narrower, purpose than the market-opening requirements of Section 251, and application of that doctrine in this context would substantial defeat achievement of Congress's objectives.

Incorporating a Sherman Act "essential facilities" analysis into the decision of what network elements should be unbundled is fundamentally inconsistent with the purposes of the 1996 Act. The Sherman Act does not forbid all monopolies in all circumstances. It prohibits willful maintenance of a monopoly, and the essential facilities doctrine is one way of proving willful maintenance. The 1996 Act is not, however, merely an industry-specific application of the Sherman Act. The 1996 Act goes much further, and imposes affirmative market-opening requirements, irrespective of whether ILECs could be shown to have willfully maintained a monopoly in the past or whether they are willfully maintaining a monopoly now. The Act is designed to bring competition to local markets "as quickly as possible" -- that is, to jumpstart competition. See H.R. Rep. No. 104-204 at 89 (1995). A standard of proof designed to identify specific instances of willful exclusionary conduct simply cannot serve as a benchmark for determining when network elements should be unbundled under an Act designed to maximize competition now, and not merely to prevent anticompetitive conduct. That standard will severely underserve the goals of the 1996 Act.

None of the specific requirements of the "essential facilities" doctrine are, or should be, prerequisites to obtaining access to network elements pursuant to § 251 of the Act. Specifically, a new entrant need not show that an ILEC has "market power" in a particular defined market before being able to take advantage of § 251. To the contrary, all ILECs are automatically bound by the requirements of § 251 until such time as the Commission makes an appropriate determination pursuant to the forbearance provisions of § 10 of the Act that § 251(c) has been fully implemented. Moreover, § 251(d)(2) cannot sensibly be read to require proof that the defendant "willfully maintained" or acquired a monopoly or specifically intended to acquire a monopoly. Grinnell Corp., 384 U.S. at 571; Spectrum Sports, Inc., 506 U.S. at 456. To meet that requirement through the "essential facilities" doctrine, the plaintiff must show that the defendant's wrongfully denied access to the facility at issue. IIIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 773e. In contrast, the Act does not require an entrant to establish any wrongful conduct by an incumbent as a prerequisite to access to the element. All ILECs are automatically subject to the duty. Nor does the Act recognize general "business justification" defenses. Once it is determined that the CLEC is entitled to access to an unbundled network element, the reasons for the ILEC's withholding of the element are irrelevant.

The essential facilities doctrine and the Act also requires different levels of anticompetitive effects. An antitrust plaintiff seeking access to an essential facility generally must prove that, without nondiscriminatory access to the facility, the plaintiff will have a "severe handicap" in the marketplace. Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990). Indeed, in some courts, such as the Ninth Circuit, the plaintiff must show that the defendant's control over the facility gives the defendant "the power to eliminate competition in the downstream market." Alaska Airlines, 948 F.2d at 544. In contrast, under the Supreme Court's mandate, the Act's language only requires "some limiting standard." Whatever "limiting standard" is adopted by this Commission, that standard plainly should not require entrants to prove that the denial of access to a particular element will drive them out of business or will altogether eliminate competition. The "essential facilities" standard is thus an improper one.

Furthermore, there is a fundamental difference between an antitrust rule fashioned by courts of limited jurisdiction -- with neither competence nor the desire to supervise an ongoing regulatory program -- and an expert federal agency explicitly charged by Congress with the task of creating competition where none previously existed. The "essential facilities" doctrine reflects a proper prudential sense of the limits of the judicial role. As Professors Areeda and Hovenkamp explained, "antitrust courts have rightly resisted undertaking the heavy, continuous and unguided burden of supervising the economic performance of business firms." IIIA Antitrust Law, ¶ 720b, at 207-09. Here Congress established a framework for federal and state regulators to set the terms and conditions for access to network elements in the context of a statute designed to maximize local competition as quickly as possible. The Commission has the authority, indeed the responsibility, to perform this task.

Finally, adopting the essential facilities doctrine is not necessary to promote facilities-based competition. The ILECs have seized upon the essential facilities doctrine because, in their view, it would limit their unbundling obligations under the Act. To try to justify that position, the ILECs have argued that leasing unbundled elements discourages facilities-based competition and innovation. But that position is fundamentally unsound. Widespread facilities-based competition will only emerge when CLECs have large-enough customer bases to support investment in duplicate facilities. That growth will be choked off if the ILECs leasing obligations are limited. MCI WorldCom does not agree that application of the essential facilities doctrine would necessarily limit ILEC leasing obligations. But regardless of the doctrine's scope, the Commission should not look to the jurisprudence of the essential facilities doctrine to evaluate the ILECs' claims about facilities build-out. That is a policy judgment heavily